



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 163 OF 2015**

**MOHAMMED OMAR.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

*(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru*

*Hon. B. J. Ndeda – Principal Magistrate delivered on the*

*23<sup>rd</sup> June, 2015 in CMCR Case No. 1503 of 2015)*

**JUDGEMENT**

The appellant **MOHAMMED OMAR** has filed this appeal challenging his conviction and sentence by the learned principal magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court on 23/6/2015 facing a charge of **BEING UNLAWFULLY PRESENT IN KENYA CONTRARY TO SECTION 53(1)(j)** as read with **SECTION 53(2) OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011**.

The particulars of the charge were that

***“On 22<sup>nd</sup> June, 2015 in Nakuru Town within Nakuru County being a Tanzanian National you were found to be unlawfully present in Kenya in that you did not have a valid pass allowing you to be lawfully present in Kenya in contravention of the Kenya Citizenship and Immigration Act, 2011”***

When the charges were read out the appellant pleaded Guilty. The facts of the charge were then read out and the appellant maintained his plea of Guilty. He was thereafter convicted by the trial court and was eventually fined Ksh 300,000/= in default to serve 18 months imprisonment and thereafter to be repatriated to Tanzania.

The appellant has appealed challenging both his conviction and sentence on grounds that his plea of guilty was not equivocal. The appeal was opposed.

The proper and the correct procedure for recording a plea is spelt out in Section 207(d) of the Criminal Procedure Act. In the case of **ADAN Vs REPUBLIC [1973] E.A 445** the court held as follows

***“(i) The charge and all the essential ingredients of the offence shall be explained to the accused in the language or in a language he understands.***

***(ii) The accuseds own words should be recorded and if they are an admission, a plea of Guilty should be recorded.***

***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts***

***(iv) If the accused does not agree with the facts or raises any questions of his guilt, his reply must be recorded and the change of***

*plea entered.*

***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded"***

I have carefully perused the record of the proceedings in the lower court in order to ascertain whether these rules on plea taking were properly complied with.

Counsel for the appellant submits that when the charge was read out the appellant initially entered a plea of '**Not Guilty**'. At page 2 of the typed proceedings upon being read the charge the appellant is said to have replied

***"I am not guilty"***

I have myself perused the handwritten record but unfortunately I have not been able to decipher the handwriting of the trial magistrate. The words written in my view could quite possibly be read as

***"I am guilty"***

as opposed to what was captured in the typing of the proceedings. Such proceedings simply reiterate the fact that judicial officers need to aspire for neatness and clarity in the recording of their proceedings. It is hoped that with the adoption of electronic recordings in court this problem may end.

Following the initial plea the facts were read out. In response to the facts the appellant said.

***"Facts are correct"***

This response of the appellant to the facts is confirmation of the fact that he had pleaded guilty to the charge. The translation of the proceedings were indicated to be English/Swahili. At no time did the appellant claim not to understand the proceedings and at no time did he ask for a translation into other vernacular language.

I am further persuaded of the fact that the appellant fully understood the proceedings and that his intention was to plead guilty to the charge by the statement he made in mitigation as follows

***"I plead for leniency. I didn't read the visa date. I used to stay at Pipeline"***

This statement of the appellant in mitigation leaves no doubt whatsoever that his plea to the charge was a guilty plea. That is why he sought for leniency in sentencing in his mitigation.

From my own perusal I am satisfied that the appellant made an equivocal plea of '**Guilty**' to the charge. He confirmed this guilty plea after the facts were read out to him. The appellant was given an opportunity to mitigate as required by law before sentence was imposed.

I find that the appellant was properly convicted in this matter. The sentence imposed was lawful and I find no reason to interfere with the same.

I find no merit in this appeal and the same is hereby dismissed in its entirety.

**Dated and delivered in Nakuru this 13<sup>th</sup> day of October, 2017.**

**MAUREEN A. ODERO**

**JUDGE**

Mr. Obutu holding brief for Mr. Mongeri for appellant